No. 90-1239

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In The

Supreme Court of the United States

October Term, 1990

THE UNITED ASSOCIATION OF BLACK LANDSCAPERS, EDDIE MARTIN, THOMAS WYNN, HAROLD BURRIS, LLOYD MAYWETHER, JOSE ROSALES, CHARLES BURTON, RUFUS POWELL, JOHN DOE, and JANE DOE, and THOMAS H. WYNN, JR.,

Petitioners,

v.

CITY OF MILWAUKEE, DEPARTMENT OF PUBLIC WORKS, BUREAU OF FORESTRY of the City of Milwaukee, ROBERT SKIERA, City Forester for the City of Milwaukee, RICHARD MEYER, Assistant City Forester for the City of Milwaukee, JOHN NORQUIST, Mayor of the City of Milwaukee, E. FRANK BRIDGES, President, Board of City Service Commissioners of the City of Milwaukee, CITY SERVICE COMMISSION OF THE CITY OF MILWAUKEE,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent, the City of Milwaukee (hereinafter the City), accepts the petitioner's, the United Association of Black Landscapers, et al. and Thomas H. Wynn, Jr. (hereinafter UABL), Statement of the Case. The City further accepts UABL's Appendix and will make reference to it in the same manner used by UABL.

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

Rule 56(e) of the Federal Rules of Civil Procedure has been in the past regularly applied to employment discrimination cases, and nothing in Rule 56(e) or Title VII of the 1964 Civil Rights Act suggests that summary judgment is an inappropriate means of disposing of utterly meritless discrimination claims.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> "FORM OF AFFIDAVIT; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting an opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify that the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an *adverse party may not rest upon the*

> *mere allegations or denials of his pleadings, but his response by affidavits are otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Federal Rules of Civil Procedure 56(e). (Emphasis added).

Even in petitioning for *certiorari*, the petitioners still rely upon the verified allegations of their complaint and the "assertions" a fact made in the affidavits. (Petition for Certiorari, pp. 4-5). It is clear from a reading of Rule 56(e) of the Federal Rules of Civil Procedure that mere "assertions" of facts and allegations in verified complaints do not constitute requisite specific facts showing there is a genuine issue for trial. That has been underscored by a trilogy of cases decided by this Court, starting with *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), ruling that an issue of fact to be "genuine" must have a real basis in the record. 475 U.S. 587, 106 S.Ct. 1356, 89 L.Ed.2d 552.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), this Court determined that, " . . . the plain language of Rule 56(c) mandates the entry of summary judgment . . . against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and upon which that party will bear the burden of proof at trial." 477 U.S. 322, 106 S.Ct. 2552-53, 91 L.Ed.2d 273.

Further, the matter of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) provides guidance on the level of factual data which the party opposing the motion must show. In that case, which

was a constitutionally-privileged libel case, this Court required that a plaintiff in opposing a motion for summary judgment must demonstrate in their submission to oppose the motion for summary judgment that actual malice existed and that they would have to prove that by clear and convincing evidence. This Court further ruled that a "genuine" disputed issue of fact is one created where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. 248, 106 S.Ct. 2510, 91 L.Ed.2d 211-212. Mr. Justice White compared the motion for summary judgment with that of a directed verdict, noting that the timing of the two motions is different. The directed verdict occurs at the close of plaintiff's case where as summary judgment occurs prior to the commencement of the trial. The purpose, however, is the same – to test if there are facts which show existence of an issue for the jury.

This Court determined in *Celotex v. Catrett, supra,* "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " 477 U.S. 327, 106 S.Ct. 2555, 91 L.Ed.2d 276.

Petitioner does not cite any authority for the proposition that summary judgment is inappropriate when applied to a Title VII case. Indeed, a plethora of decisions which have emanated from the various circuits all lead inevitably to the conclusion that summary judgment is an appropriate means of disposing of discrimination cases where no genuine material issues of fact are presented by the parties. *Cartagena v. Secretary of the Navy,* 618 F.2d 130

(1st Cir. 1980); *Hood v. New Jersey Department of Civil Service*, 680 F.2d 955 (3d Cir. 1982); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982); *Gordon v. Watson*, 622 F.2d 120 (5th Cir. 1980); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982); *Huhn v. Koehring Company*, 718 F.2d 239 (7th Cir. 1983); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983); *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983); *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922 (D.C. Cir. 1982).

Lastly, it cannot help but be observed that in their petition for certiorari in this matter, the petitioners have not cited one fact which was in any way slighted by the District Court or the Court of Appeals and which tends to show that discrimination has been or is occurring to any of the plaintiffs in this matter or to any of the members of the putative class. In effect, petitioners have now had "three kicks at the cat," they have had an opportunity in the District Court, they have had an opportunity in the Seventh Circuit, and they have had an opportunity here to demonstrate those disputed facts which entitle them to having the respondents' motion for summary judgment denied and this case go on to trial. Yet nowhere have they cited any such facts which taken together would even begin to demonstrate that they would have a *prima facie* case of employment discrimination which has not in any way been refuted by the respondents.

THE 7TH CIRCUIT CORRECTLY INTERPRETED THIS COURT'S HOLDING IN *WARDS COVE PACKING CO. V. ATONIO*, 490 U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

In that case Mr. Justice White, speaking for a majority of the Court, determined that not only must the plaintiffs demonstrate there was observable disparate impact, but that they must identify and isolate the means and methods by which the unlawful disparate impact took place in order to establish a *prima facie* case of employment race discrimination.

The petitioners have nowhere demonstrated even the existence of an observable disparate impact. Nor have they identified what caused it, were it to exist. Indeed, as the Seventh Circuit noted in its opinion, Mr. Stebbins, the petitioner's expert witness, did not perform his own analysis, rather merely questioned the analysis of Dr. Friedland (the respondent's expert witness) in determining that there was altogether insufficient data to support a case of disparate impact. (Appendix of Pet. for Writ of Certiorari, p. 4). Thus, the petitioners fall squarely within the analysis of Mr. Justice White in *Wards Cove* – they have failed to establish a statistically relevant disparate impact and on top of that have failed to demonstrate that any such observable statistical disparate impact is attributable to any of the testing mechanisms which Mr. Martin and Mr. Wynn so vehemently dislike.

CONCLUSION

For the foregoing reasons the petition for the writ of certiorari should be denied, this matter should be dismissed.

Respectfully submitted at Milwaukee, Wisconsin this 12th day of February, 1991.

Respectfully submitted,

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